Supreme Court, U.S.
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No. _____

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

GRANVILLE AMOS, *et al.*,
Petitioners,

v.

MARYLAND DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for a Writ of Certiorari

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80 pp

QUESTION PRESENTED

Do § 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act apply to state prisoners?

LIST OF PARTIES

The petitioners before this Court are Granville Amos, Harvey Bloxom, Michael Holt, Teddy Jones, Charles Madison, Howard Megginson, Boris Prymerman, Gary Ralph, Dennis B. Absher, John Smith, Jr., Michael Hilman Smith, William Lewis Smith, and Calvin J. Whiting. The respondents are the Maryland Department of Public Safety and Correctional Services, Roxbury Correctional Institution, Richard Lanham, Sr., Jon P. Galley, Ronald Moats, and William Smith.

TABLE OF CONTENTS

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY AND REGULATORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

A. Proceedings in the District Court 2

B. Proceedings in the Court of Appeals ... 5

REASONS FOR GRANTING THE PETITION 9

I. THE DECISION BELOW CREATES A CONFLICT AMONG THE CIRCUITS 9

II. THE DECISION BELOW IS INCONSISTENT WITH DECISIONS OF THIS COURT 12

A. The Court Below Erred in Refusing to Give Effect to the Clear Meaning of the Statutes as Written 13

B. The Court Below Misapplied the "Clear Statement Rule" *of Will v. Michigan Dep't of State Police* and *Gregory v. Ashcroft* 17

C. The Court Below Erred in Failing to Defer to the DOJ's Rehabilitation Act Regulations Because Congress Explicitly Authorized The Regulations and Subsequently Incorporated Them into the ADA 22

CONCLUSION 28

TABLE OF AUTHORITIES

Cases

Alexander v. Choate, 469 U.S. 287 (1985) 24,27

Amos v. Maryland Dep't of Public Safety & Correctional Servs., 126 F.3d 589 (4th Cir. 1997) ..... *passim*

Armstrong v. Wilson, 124 F.3d 1019 (9th Cir. 1997), *petition for cert. filed*, 66 U.S.LW. 3308 (U.S. Oct. 20, 1997) 11,12

Bailey v. United States, 116 S.Ct. 501 (1995) 12,14

Bonner v. Lewis, 857 F.2d 559 (9th Cir. 1988) 11

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 12,22,26

City of Edmonds v. Oxford House, Inc., 514 U.S. 725 (1995) 22

Clarkson v. Coughlin, 898 F. Supp. 1019 (S.D.N.Y. 1995) ... 11

Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984) ... 27

Crawford v. Indiana Dep't of Corrections, 115 F.3d 481 (7th Cir. 1997) 10,12,21

Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469 (1992) 14

Foster v. Love, 66 U.S.L.W. 4015 (U.S. Dec. 2, 1997) 21

Garcia v. Metro. Transit Auth., 469 U.S. 528 (1985) 21

Gregory v. Ashcroft, 501 U.S. 452 (1991) 12,17,18,20

Hutto v. Finney, 437 U.S. 678 (1978) 15

Journey v. Vitek, 685 F.2d 239 (8th Cir. 1982) 11

Little v. Lycoming County, 912 F. Supp. 809 (M.D. Pa.), *aff'd mem.*, 101 F.3d 691 (3d Cir. 1996) 11

Niece v. Fitzner, 941 F. Supp. 1497 (E.D. Mich. 1996) 11

Noland v. Wheatley, 835 F. Supp. 476 (N.D. Ind. 1993) 11

Onishea v. Hopper, 126 F.3d 1323 (11th Cir. 1997) 11

Outlaw v. City of Dothan, No. CV 92-A-1219-S, 1993 WL 627038 (E.D. Mo. Oct. 10, 1997) 11

Pierce v. King, 918 F. Supp. 932 (E.D.N.C. 1996), *aff'd*, No. 96-7061, slip op. (4th Cir. Dec. 11, 1997) .. 11

Randolph v. Rodgers, No. 4:94 CV 991, 1997 WL 627038 (E.D. Mo. Oct. 10, 1997) 11

Salinas v. United States, No. 96-738, 1997 WL 737692 (U.S. Dec. 2, 1997) 18

School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987) 27

Shea v. Vialpando, 416 U.S. 251 (1974) 14

Sites v. McKenzie, 423 F. Supp. 1190 (N.D. W. Va. 1976) .. 11

Smiley v. Citibank (S. D.), N.A., 116 S. Ct. 1730 (1996) 26

Torcasio v. Murray, 57 F.3d 1340 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 772 (1996) 5,10

White v. Colorado, 82 F.3d 364 (10th Cir. 1996) 12

Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989) 12,17

Williams v. Meese, 926 F.2d 994 (10th Cir. 1991) 12

Yeskey v. Pennsylvania Dep't of Corrections, 118 F.3d 168 (3d Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3298 (U.S. Oct. 8, 1997) 11,12,27

Statutes

29 U.S.C.A. § 701 (West 1985 & Supp. 1997) 7,17

29 U.S.C.A. § 706 (West 1985 & Supp. 1997) 20

29 U.S.C.A. § 792 (West 1985 & Supp. 1997) 25

29 U.S.C.A. § 794 (West Supp. 1997) ..... *passim*

42 U.S.C.A. § 12101 (West 1995) 7,17

42 U.S.C.A. § 12114 (West 1995) 20

42 U.S.C.A. § 12131 (West 1995) 9,14

42 U.S.C.A. § 12132 (West 1995) 4,13

42 U.S.C.A. § 12133 (West 1995) 16

42 U.S.C.A. § 12134 (West 1995) 24

42 U.S.C.A. § 12201 (West 1995) . . . . . *passim*

42 U.S.C.A. § 12210 (West 1995) 20

42 U.S.C.A. § 12211 (West 1995) 20

Regulations

28 C.F.R. § 35.130 (1997) 8

28 C.F.R. § 35.151 (1997) 26

28 C.F.R. pt. 35, app. A (1997) 24

36 C.F.R. § 1191.2 (1997) 26

41 C.F.R. pt. 101, subpt. 101-19, app. A. (1997) 26

45 C.F.R. § 84.12 (1997) 8

45 Fed. Reg. 37,620-37,636 (1980) (codified at 28 C.F.R. §§ 42.501-540, app. A (1980)) . . . . . *passim*

Miscellaneous

H.R. Rep. No. 485, Part II, *reprinted in* 1990 U.S.C.C.A.N. 267, 366-67, 473 16,19,20,23

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 126 F.3d 589 (4th Cir. 1997). The opinions of the district court are unreported. They are set forth in the appendix at 1a - 12a. (hereinafter App.)

JURISDICTION

The decision of the Fourth Circuit was entered on September 22, 1997. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent text of the following statutes and regulations is set forth in the appendix to this petition at 13a - 40a:

Statutes
29 U.S.C.A. § 701 (West 1985 & Supp. 1997)
29 U.S.C.A. § 706 (West 1985 & Supp. 1997)
29 U.S.C.A. § 792 (West 1985 & Supp. 1997)
29 U.S.C.A. § 794(a), (b) (West Supp. 1997)
42 U.S.C.A. § 12101 (West 1995)
42 U.S.C.A. § 12114 (West 1995)
42 U.S.C.A. §§ 12131-12134 (West 1995)
42 U.S.C.A. § 12201 (West 1995)

42 U.S.C.A. § 12210 (West 1995)
42 U.S.C.A. § 12211 (West 1995)

Regulations
28 C.F.R. pt. 35, app. A (1997)
28 C.F.R. § 35.130 (1997)
28 C.F.R. § 35.151 (1997)
28 C.F.R. § 35.190 (1997)
28 C.F.R. § 39.150 (1997)
36 C.F.R. pt. 1191, app. A (1997)
41 C.F.R. pt. 101, subpt. 101-19.6, app. A (1997)
45 C.F.R. § 84.12 (1997)
45 Fed.Reg. 37,620-37,636 (1980) (codified at 28 C.F.R. §§ 42.501-40, app. A (1980))

STATEMENT OF THE CASE

A. Proceedings in the District Court

Petitioners are thirteen physically disabled individuals incarcerated at Roxbury Correctional Institution (hereinafter RCI) in Maryland. RCI is not handicap-accessible. Built in 1982, it was designated in 1984 as the only secure correctional facility in Maryland to house disabled prisoners. Petitioners filed suit in 1991 in federal district court against the Maryland Department of Public Safety and Correctional Services, RCI, Corrections Commissioner Richard Lanham, and RCI Warden John P. Galley, seeking injunctive relief and damages to remedy violations of § 504 of the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 394 (codified at 29 U.S.C.A. § 794 *et seq.* (West Supp. 1997)) (hereinafter Rehabilitation Act).[1]

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[1]The Rehabilitation Act applies to any state governmental program or activity that receives Federal financial assistance:

The failure of the respondent state prison officials to make RCI handicap-accessible has taken a harsh toll on petitioners. Petitioners alleged[2] that, unlike non-disabled prisoners, their access to prison services, jobs and programs is severely restricted by the State's failure to make adjustments to the physical plant at RCI such as proper placement of grab-bars, sinks and toilets. The bathrooms in their cells[3] and the program areas at RCI lack proper grab-bars, causing the prisoners to fall when shifting from their wheelchairs to the toilets. Bathroom doorways are too narrow for their wheelchairs, causing the prisoners to defecate on themselves in the school, library, chapel, and recreation yard. The sinks in their cells are too high for wheelchair users, and the showers in the tier are barely handicap accessible, making it difficult, if not impossible, for the prisoners to keep themselves clean. The cell doorways are too narrow for wheelchairs, so the prisoners bruise their hands entering and exiting their cells. They can reach the medication dispensary and vocational shop only with great difficulty, if at all, because the ramp leading to them is too steep for wheelchairs. The prisoners are denied the opportunity to participate in the

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> United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

29 U.S.C.A. § 794(a).

[2]Petitioners' allegations were presented in their amended complaint, and in their summary judgment motions, which cited deposition testimony and declarations. The evidence of record was presented to the Fourth Circuit Court of Appeals in a joint appendix.

[3]Petitioners were assigned to Housing Unit 5 at RCI, which is not handicap-accessible. In 1989, respondents constructed a new housing unit at RCI, but did not make it handicap-accessible.

vast majority of jobs at RCI, and in work release and pre-release programs in or near their home communities.

The State brought a motion to dismiss the complaint, alleging that the Rehabilitation Act did not apply because RCI was not a recipient of federal funds. On June 26, 1991, the district court denied the motion to dismiss, ruling that RCI, as part of the operations of the defendant Department of Public Safety and Correctional Services, is a recipient of federal funds and engaged in a "program or activity," defined by the Rehabilitation Act to include "all of the operations of a department . . . of a State or of a local government." App. 9a.

The prisoners amended their complaint in 1992 to add claims under Title II of the Americans with Disabilities Act of 1990, 42 U.S.C.A. §§ 12131-65 (West 1995) (hereinafter ADA), which took effect on January 26, 1992.[4]

On June 28, 1993, the prisoners filed a motion for partial summary judgment on the claims for injunctive relief. The State filed an opposition and a cross-motion for partial summary judgment on September 27, 1993. In July 1995, the

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[4]By its terms, the ADA applies to programs and services provided by "public entities" such as state governmental agencies. It provides:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C.A. § 12132.

The amended complaint also added claims against prison officials acting in their official capacities, alleging inadequate medical treatment in violation of the Eighth and Fourteenth Amendments to the Constitution.

district court ordered the parties to submit memoranda regarding the effect on petitioners' case of the decision in *Torcasio v. Murray*, 57 F.3d 1340 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 772 (1996). In *Torcasio*, which held that prison officials sued in their official capacities under the ADA and Rehabilitation Act were entitled to qualified immunity (as it was not "clearly established" at the time of the alleged discrimination that the statutes applied to state prisons), the Fourth Circuit suggested in *dicta* that the statutes do not apply to prisoners.

The State filed a supplemental summary judgment motion on the damages claims on July 27, 1995, followed by a brief regarding the impact of *Torcasio.* The prisoners briefed the impact of *Torcasio* on September 12, 1995, and filed an opposition to the State's motion and a cross-motion for partial summary judgment on the statutory claims on September 22, 1995.

On January 26, 1996, the district court issued a memorandum decision granting the State's summary judgment motion on the statutory claims based on the *Torcasio dicta* and in the interest of "sound judicial management and prudent use of resources." [5] App. 4a.

B. Proceedings in the Court of Appeals

The prisoners appealed to the Fourth Circuit, joined by the United States Department of Justice (DOJ) as *amicus*

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[5]On May 30, 1996, the district court entered an order dismissing petitioners' constitutional medical claims and consolidating the above-entitled action with *Smith v. Lanham*, Civil No. JFM-95-524, for the purpose of appeal. App. 2a. The court filed an amended order on June 10, 1996, withdrawing its previous order and granting respondents' motion for summary judgment on the constitutional and statutory claims. App. 1a.

curiae. A divided three-judge panel of the Fourth Circuit upheld the district court's grant of summary judgment for respondents. In a decision by the Honorable Karen Williams, the majority concluded that the plain language of the ADA and Rehabilitation Act does not explicitly cover state prisons, and that absent a clear statement of congressional intent to apply the statutes to state prisons, federal intrusion into the states' domain of prison management is not warranted.[6] The Honorable Francis D. Murnaghan, Jr., dissented from the conclusion that the ADA and the Rehabilitation Act do not apply to state prisons in light of the unambiguous statutory language applying the acts to all operations of every state government agency, including the respondent Maryland Department of Public Safety and Correctional Services, and RCI, one of its "operations." *Amos v. Maryland Dep't of Public Safety & Correctional Servs.*, 126 F.3d 589, 613 (4th Cir. 1997) (Murnaghan, J., dissenting).

The majority stated that prison operations do not "fall naturally within the statutory terms 'services,' 'programs,' and 'activities'" provided by "public entities." 126 F.3d at 601. It reasoned that the ordinary meanings of the terms "eligible" and "participate" imply voluntariness, and thus exclude prisoners. *Id.* The court below relied exclusively upon two of the nine stated purposes underlying the statutes, "to assure equality of opportunity, full participation, independent living, and economic sufficiency for [disabled] individuals . . . [and] to pursue those opportunities for which our free society is

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[6]The Fourth Circuit also affirmed the dismissal of petitioners' constitutional claims regarding their medical care. Petitioners do not seek review of the Fourth Circuit's ruling on these claims.

justifiably famous."[7] Based on these selected purposes, the majority accordingly state prisoners from coverage "because of their inability to live in a free society" and enjoy the benefits of equal opportunity promoted by the statutes. *Id.* at 602. However, as noted by the dissent, the *Amos* majority failed to consider that Congress also enacted the ADA and the Rehabilitation Act to eliminate discrimination against disabled individuals based upon an explicit finding that "discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations . . . *institutionalization*, health services, voting and public services."[8]

The majority of the panel acknowledged that many regulations promulgated by DOJ under the Rehabilitation Act and the ADA specifically apply the acts to state prisons. 126 F.3d at 606. The court cited the Rehabilitation Act regulation that defines the word "program" to include the operations of a department of corrections,[9] an ADA regulation governing programs relating to law enforcement including "correctional institutions,"[10] and an ADA regulation that requires public entities to provide attendant care, "where the individual is an

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[7] *Id.* at 601-02 (citing 42 U.S.C.A. § 12101(a)(8) - (a)(9) (West 1995)); *see also id.* at 602 (citing the introductory section of the Rehabilitation Act, codified at 29 U.S.C.A. §701(a)(3) (West Supp. 1997), which provides for "full inclusion and integration [of disabled individuals] in the economic, political, social, cultural and education mainstream of American society")).

[8] *See* 42 U.S.C.A. § 12101(a)(3) (emphasis added); 29 U.S.C.A. § 701(a)(5); 126 F.3d at 615 (Murnaghan, J., dissenting).

[9] 126 F.3d at 606 (citing 28 C.F.R. § 42.540(h)).

[10] *Id.* (citing 28 C.F.R. § 35.190(b)(6)).

inmate of a custodial or correctional institution."[11] However, the majority refused to accord any deference to these regulations on the ground that "[t]he implications for the balance of power between the Federal Government and the States . . . are enormous" because of the "intrusiveness of [the] regulations." *Id.* at 606.[12]

In his dissent, Judge Murnaghan concluded that there is a clear statement in both the Rehabilitation Act and the ADA of Congress' intent to apply the acts to state prisoners.[13] Judge Murnaghan pointed out that the Rehabilitation Act defines "any program or activity" to include "all of the operations of . . . a department, agency, special purpose district, or other instrumentality of a State or of a local government . . . any part of which is extended Federal financial assistance."[14] Similarly, Judge Murnaghan pointed out that the ADA defines "public entity" as "any department, agency, special purpose district, or other instrumentality of a

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[11] *Id.* (citing 28 C.F.R. pt. 35, app. A, at 468).

[12] The court failed to substantiate its determination with any evidence from the lower court record revealing the "intrusive" nature of the DOJ regulations. Under the disability discrimination laws, respondents could justify their failure to provide the plaintiffs with access to the full range of jobs and vocational opportunities at RCI only by demonstrating that doing so would pose an undue hardship on the operations of the programs, or would fundamentally alter the nature of the programs. *See* 45 C.F.R. § 84.12(a)(1997); 28 C.F.R. § 35.130(b)(7)(1997). Respondents have failed to present any evidence to this effect.

[13] 126 F.3d at 616 (Murnaghan, J., dissenting) (citing 42 U.S.C.A. § 12101(b)(1); *Alexander v. Choate*, 469 U.S. 287, 295-97 (1985)).

[14] 126 F.3d at 614 (Murnaghan, J., dissenting) (citing 29 U.S.C.A. § 794(b)(1)(A)). It is undisputed that respondents were collectively the recipients of federal financial assistance. *See* 126 F.3d at 594 n.5.

State or States or local government."[15] Judge Murnaghan also disagreed with the majority's finding that the statutes were not intended to apply to prisoners because the statutory terms "eligibility and participation" necessarily imply voluntariness. Judge Murnaghan cited case law in which many compulsory activities (*e.g.*, jury service and public education) were held subject to the statutes. Accordingly, he concluded, prisoners are eligible for consideration as "qualified individuals" under the statutes. *Id.* at 615 (citations omitted).

The decision of the panel was entered on September 22, 1997. The petitioners did not seek rehearing.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CREATES A CONFLICT AMONG THE CIRCUITS

There is a clear conflict among the courts of appeal on the issue raised by this case. While the Third, Seventh and Ninth Circuits have held that the ADA and the Rehabilitation Act apply to state prisons, the Fourth and Tenth Circuits have held that the ADA and the Rehabilitation Act do not apply to state prisons.[16]

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[15] *Id.* at 614 (citing 42 U.S.C.A. § 12131(1)(B)).

[16] In reaching its conclusion, the *Amos* majority not only acknowledged the conflict in the circuits, but also invited this Court to resolve it:

> [W]e are (and we believe that the Supreme Court will ultimately find itself) persuaded in no small measure by the extraordinarily circuitous statutory analyses which those courts reaching the contrary conclusion have undertaken and the considerable extra-interpretive energies that those courts have been forced to expend in order to limit the systemic chaos that would otherwise

The Third, Seventh and Ninth Circuits have explicitly rejected the Fourth Circuit's reasoning in *Amos* and *Torcasio*[17] that the statutory language is too broad to cover state prisons absent a clearer statement of congressional intent. These courts have held that the plain language of the statutes is unambiguous and applies to state prisons:

> We doubt . . . that Congress could speak much more clearly than it did when it made the [ADA] expressly applicable to all public entities and defined the term "public entity' to include every possible agency of state or local government.

Crawford v. Indiana Dep't of Corrections, 115 F.3d 481, 485 (7th Cir. 1997) (Posner, C.J.) (holding that the ADA and Rehabilitation Act apply to state prisons based upon the plain meaning of the statutory language, the ADA's explicit broad statement of purpose to eliminate discrimination, and Congress' incorporation into the ADA of the Rehabilitation Act's scope of coverage, and Congress' failure to create an

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> have followed on their holdings that these statutes apply to the Nation's myriad state prisons.

Id. at 591; *see also id.* at 600.

[17] *Torcasio v. Murray*, 57 F.3d 1340 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 772 (1996). The court below in *Amos* stated, "[a]fter painstakingly reexamining our opinion in *Torcasio*, we are convinced that *Torcasio*'s analysis of the issue is, indeed, compelling, and that the Rehabilitation Act and the ADA do not apply in the state prison context." 126 F.3d at 591, 600. The court further indicated that, "[b]ecause *Torcasio's* review of the language of the statutes, the relevant constitutional principles, and the manner in which our sister Circuits have addressed the issue was especially thorough, we begin our analysis with a full statement of what we decided in that case." *Id.* at 594. *See also id.* at 594-95, 601.

exception for state prisons); *Armstrong v. Wilson*, 124 F.3d 1019, 1023-24 (9th Cir. 1997) (holding that the plain language of the ADA and Rehabilitation Act applies to state prisons as "public entit[ies]" that provide "program[s] or activit[ies]"), *petition for cert. filed*, 66 U.S.L.W. 3308 (U.S. Oct. 20, 1997) (No. 97-686); *Yeskey v. Pennsylvania Dep't of Corrections*, 118 F.3d 168, 170 (3d Cir. 1997) (holding that the plain, unambiguous language of the ADA and Rehabilitation Act covers state prisons as "public entit[ies]" that provide "activit[ies]," meaning "'natural or normal function[s] or operation[s] . . . of an organizational unit,'" and according deference to the DOJ implementing regulations which specifically apply the statutes to state prisons and were expressly authorized by Congress), *petition for cert. filed*, 66 U.S.L.W. 3298 (U.S. Oct. 8, 1997) (No. 97-634) (citation omitted). *See also Onishea v. Hopper*, 126 F.3d 1323, 1334 n.18 (11th Cir. 1997) (applying the Rehabilitation Act to state prisoners under law of the case doctrine, citing *Harris v. Thigpen*, 941 F.2d 1495, 1522 n.41 (11th Cir. 1991)); *Bonner v. Lewis*, 857 F.2d 559, 562 (9th Cir. 1988) (holding that the Rehabilitation Act covers state prisoner, according to the plain statutory language and implementing regulations); *cf. Journey v. Vitek*, 685 F.2d 239 (8th Cir. 1982) (affirming prisoner's Rehabilitation Act claim where the defendants conceded that the statute applied to prisons).[18]

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[18]Many federal district courts have also held that the ADA and the Rehabilitation Act apply to state prisons. *See Randolph v. Rodgers*, No. 4:94 CV 991, 1997 WL 627038, at *7-*9 (E.D. Mo. Oct. 10, 1997); *Niece v. Fitzner*, 941 F. Supp. 1497, 1505-11 (E.D. Mich. 1996); *Clarkson v. Coughlin*, 898 F. Supp. 1019, 1035-37 (S.D.N.Y. 1995); *Noland v. Wheatley*, 835 F. Supp. 476 (N.D. Ind. 1993); *Outlaw v. City of Dothan*, No. CV 92-A-1219-S, 1993 WL 735802, at *4 (M.D. Ala. Apr. 27, 1993); *Sites v. McKenzie*, 423 F. Supp. 1190, 1197 (N.D. W. Va. 1976). *But see Pierce v. King*, 918 F. Supp. 932 (E.D.N.C. 1996) (holding that the ADA does not apply to state prisoner work assignments), *aff'd*, No. 96-7061, slip op. (4th Cir. Dec. 11, 1997); *Little v. Lycoming County*, 912 F. Supp. 809,

As further evidence of clear congressional intent, the Third and Seventh Circuits relied upon the regulations promulgated by the DOJ and authorized by Congress that specifically apply the statutes to state prisons. *Yeskey*, 118 F.3d at 171; *Crawford*, 115 F.3d at 484. The majority in *Amos* refused to defer to these regulations because the statutes implicated "the balance of power between the Federal Government and the states." 126 F.3d at 606. This reasoning was squarely rejected by the Third, Seventh and Ninth Circuits. *See Yeskey*, 118 F.3d at 173; *Crawford*, 115 F.3d at 485; *Armstrong*, 124 F.3d at 1024-25.

The Tenth Circuit has refused to apply the statutes to prisoner employment. *White v. Colorado*, 82 F.3d 364 (10th Cir. 1996); *Williams v. Meese*, 926 F.2d 994 (10th Cir. 1991). However, these Tenth Circuit decisions do not address the general issue of whether the statutes apply to state prisons. *See Armstrong*, 124 F.3d at 1025 (9th Cir. 1997) (distinguishing *White*); *but see Amos*, 126 F.3d at 597 (interpreting the *White* decision broadly to exclude from statutory coverage state prison programs or activities).

II. THE DECISION BELOW IS INCONSISTENT WITH DECISIONS OF THIS COURT

The decision of the court below is inconsistent with the reasoning in the decisions of this Court in *Bailey v. United States*, 116 S.Ct. 501, 506 (1995) and *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984) and its progeny. The *Amos* decision also misapplies *Gregory v. Ashcroft*, 501 U.S. 452 (1991) and *Will v.*

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820 (M.D. Pa.), *aff'd mem.*, 101 F.3d 691 (3d Cir. 1996) (granting state officials qualified immunity from liability under the ADA because statutory coverage of state prisons was not "clearly established" at the time of the alleged violation; suggesting that the ADA does not apply to state prisons).

Michigan Dep't of State Police, 491 U.S. 58 (1989).

A. The Court Below Erred in Refusing to Give Effect to the Clear Meaning of the Statutes as Written

The plain language of the Rehabilitation Act and the ADA covers state prisoners and thus does not allow for judicial creation of an unstated "prison exception" to coverage. The Rehabilitation Act applies to *any* state governmental program or activity that receives Federal financial assistance.[19] The Act defines the terms "program or activity" as "all of the operations of a . . . State or local government . . . any part of which is extended Federal financial assistance."[20] The plain language of Title II of the ADA also covers state prisoners.[21] The ADA applies to "services, programs, or activities of a public entity" irrespective of federal financial assistance. 42 U.S.C.A. § 12132. "Public entity" is defined in both statutes to include a "department, agency, special purpose district or

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[19]"No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C.A. § 794(a).

[20]29 U.S.C.A. § 794 (b)(1)(A).

[21]Title II of the ADA provides in pertinent part:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C.A. § 12132.

other instrumentality of a State or States or local government."[22]

The *Amos* majority conceded that the plain language of the statutes "when viewed in isolation, appears all-encompassing." 126 F.3d at 594. Nevertheless, noting that prisons are not explicitly mentioned in the statutes, the court refused to apply to prisons terms such as "services, programs or activities of a public entity." *Id.* at 595-96, 602. To do so, according to the *Amos* majority, would upset the traditional balance of power between the federal government and the states. *Id.*

The decision of the Fourth Circuit is inconsistent with the principle stated in *Bailey v. United States*, 116 S. Ct. 501, 506 (1995), that when Congress uses unambiguous terms, there is no occasion for judicial inquiry beyond the words of the statute. In *Bailey*, the Court ruled that the plain meaning of the term "use" connotes action, and reversed the convictions of two defendants under the federal criminal code for insufficient evidence they "used" firearms during a drug trafficking offense. *Id.* at 509. *See also Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992) ("In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished.")

The *Amos* majority acknowledged that the breadth of the statutory language covering "any program or activity"[23] of

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[22] 42 U.S.C.A. § 12131(1)(B); 29 U.S.C.A. § 794(b)(1)(A).

[23] The majority disregarded that the word "any," which modifies "program or activity" in the Rehabilitation Act means without limitation. *See, e.g., Shea v. Vialpando*, 416 U.S. 251, 260 (1974) (holding that the

a "public entity" is "all encompassing" and that the statutes explicitly subject the states to liability. 126 F.3d at 594. But it disregarded this "all encompassing" language, and finding no explicit mention of prisons in the statutes, *id.* at 596, it concluded that "Congress did not contemplate, let alone approve, the pre-ADA application of the Rehabilitation Act to state prisons." *Id.* at 603. This is demonstrably incorrect.

In the Rehabilitation Act, Congress directed the Attorney General and all agency heads to promulgate regulations to carry out the statute and to submit "[c]opies of any proposed regulations . . . to appropriate authorizing committees of the Congress." 29 U.S.C.A. § 794(a).[24] In accordance with this congressional mandate, the DOJ promulgated regulations, many of which specifically apply the statute to state prisons. Subsequently, Congress expressly incorporated the regulations into the ADA.[25] In 1990, when

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plain meaning of the term "any" in Social Security Act means that no limitation, apart from reasonableness, may be used to calculate allowance for AFDC beneficiaries); *Hutto v. Finney*, 437 U.S. 678, 694 (1978) (stating that the Civil Rights Attorney's Fees Award Act applies to "any" action brought to enforce 42 U.S.C.A. § 1983, and allows the prevailing party to recover attorney fees and costs).

[24]This approval process suggests that Congress was aware of the regulations promulgated under the Rehabilitation Act that apply the statute to state prisons. *See infra* Point II.C.

[25]Section 12201(a) provides:

> Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C.A. § 790 *et seq.*) or the regulations issued by Federal agencies pursuant to such title.

42 U.S.C.A. § 12201(a) (West 1995). Congress not only incorporated the

Congress enacted the provision of the ADA incorporating the existing DOJ regulations that explicitly applies the Rehabilitation Act to state prisons, those regulations had been on the books *for ten years*.[26]

The *Amos* majority ignored this congressional mandate and pointed to "[c]ongressional silence in the ADA's legislative history regarding the applicability of the statute to state prisons." 126 F.3d at 602. However, since the regulations specifically apply the statutes to state prisons and Congress subsequently incorporated these regulations in the ADA, the court's reliance on "congressional silence" is misplaced.[27]

The court found that the statutory language "does not even hint at an intention by Congress to make the ADA applicable to state prisons. Indeed, the contrary inference . . . [should be] drawn." 126 F.3d at 602. The court concluded that prisoners cannot be "qualified" to participate in programs or services covered by the statute, because the statutory terms "eligible" and "participate" imply voluntary participation. 126

Rehabilitation Act regulations into the ADA, but also "any requirements of those regulations . . . such as program access that go beyond Titles I and III." H.R. Rep. No. 485, Part II, *reprinted in* 1990 U.S.C.C.A.N. 267, 366-67. Congress also incorporated into the ADA "[t]he remedies, procedures, and rights set forth in section 794a of Title 29 [the Rehabilitation Act] . . . to any person alleging discrimination on the basis of disability in violation of Section 12132." 42 U.S.C.A. § 12133 (West 1995).

[26]*See, e.g.*, 45 Fed. Reg. 37,620, 37,630 (1980) (codified at 28 C.F.R. Part 42(G) (1980)).

[27]In fact, the legislative history of the ADA cites the need to train jail personnel about non-discriminatory treatment of disabled arrestees in order to assure their compliance with the statute. *See* H.R. Rep. No. 485, Part II, *reprinted in* 1990 U.S.C.C.A.N. 473.

F.3d at 596, 601. In fact, Congress made clear that it intended the ADA to apply even in involuntary contexts. The statutory findings state that "discrimination against individuals with disabilities persists in such critical areas as . . . institutionalization."[28] But the *Amos* majority ignored this finding and focused exclusively on the provision that promoted mainstreaming disabled individuals into society. 126 F.3d at 601-02.

B. The Court Below Misapplied the "Clear Statement Rule" *of Will v. Michigan Dep't of State Police* and *Gregory v. Ashcroft*

Citing *Will v. Michigan Dept of State Police*, 491 U.S. 58, 65 (1989) and *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991), the *Amos* majority disregarded the plain statutory language evincing Congress' intent and reasoned that the "clear statement rule" of statutory construction precludes a finding that the ADA and Rehabilitation Act apply to state prisoners:

> If Congress intends to alter the "usual constitutional balance between the States and the Federal Government," it must make its intention to do so "unmistakably clear in the language of the statute. . . . In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision."

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[28] 42 U.S.C.A. § 12101(a)(3); 29 U.S.C.A. § 701(a)(3).

Amos, 126 F.3d at 595 (quoting *Will*, 491 U.S. at 65) (internal citations omitted); *id.* at 604.

The *Amos* majority also relied on *Gregory v. Ashcroft* for its clear statement rule analysis. 126 F.3d at 604-05. It reasoned that "management of state prisons is a core state function" in which federal courts must not intrude, absent express statutory language applying the statutes to state prisons. *Id.* at 595. Because the statutes do not expressly state that they cover state prisoners, the court concluded that federal intrusion into state prison management is not warranted. *Id.* at 602.

The Fourth Circuit misapplied *Gregory* and *Will*. Courts are to resort to the "clear statement rule" *only* where statutory language is ambiguous, *Gregory*, 501 U.S. at 470,[29] *and* the proposed application of federal law would infringe upon a core function going to the "heart of representative government," *e.g.*, "the authority of the people of the States to determine the qualifications of their most important government officials." *Id.* at 463.

In *Gregory*, this Court held that the Age Discrimination in Employment Act of 1967 (ADEA) did not preempt a Missouri constitutional provision mandating retirement for state judges at age 70. *Id.* at 473. The case turned on whether state judges were "appointee[s] on the policymaking level" within the terms of the ADEA, and thus exempt from the statute. *Id.* at 465. Finding the statutory text ambiguous, the

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[29] *See also Salinas v. United States*, No. 96-738, 1997 WL 737692, at *6 (U.S. Dec. 2, 1997) (affirming a bribery conviction and refusing to apply the clear statement rule where the plain unambiguous language of the federal penal statute did not require proof that a bribe involved federal funds and the "statute can be unambiguous without addressing every interpretive theory offered by a party").

Court declined to resolve the ambiguity in favor of coverage of state judges. To do so would preempt the state constitutional provision, and "[t]his provision goes beyond an area traditionally regulated by the States; it is a decision of the most fundamental sort for a sovereign entity." *Id.* at 460.

It was error for the *Amos* court to invoke the "clear statement rule" because neither part of the two-part standard applies. The statutory language is not ambiguous, and the application of the statutes would not infringe a core function going to the "heart of representative government."

Congress has clearly stated that the non-discrimination mandate of the statutes applies to *all* operations of state and local governments. What is more, Congress has authorized regulations pursuant to the Rehabilitation Act that specifically apply the statute to state prisons, and then *has actually incorporated these regulations into the ADA.*[30] *See infra* Point II.C.

The court below concluded that the statutes are ambiguous and thus that the "clear statement rule" should be invoked because "prisons are not expressly mentioned in the statute[s]." 126 F.3d 596, 604.[31] But in *Gregory*, the Court

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[30] 29 U.S.C.A. § 794(a); 42 U.S.C.A. § 12201.

[31] The court below stated, "a clear statement is required . . . whether the statute applies in the particular manner claimed," 126 F.3d at 604, and found that "[t]he applicability of the statutes to state prisons and prisoners . . . was simply not addressed by Congress in the language of the statutes." *Id.* at 605. The *Amos* majority failed to take into account the legislative history of the ADA which reflects Congress' intention "not to list [in Title II] all the types of discrimination that are included within the term 'discrimination' as was done in Titles I and III, because this title [Title II] essentially simply extends the anti-discrimination prohibition embodied in Section 504 to all actions of state and local governments." H.R. Rep. No.

rejected the notion that Congress must specify each governmental entity or category of agencies to be covered by a statute. 501 U.S. at 467 ("This does not mean that the [ADEA] must mention judges explicitly. . . . Rather, it must be plain to anyone reading the Act that it covers judges.")[32]

In *Gregory*, there was a genuine ambiguity in the ADEA provision regarding the scope of coverage; at issue was a statutory provision creating an *exception* to coverage, an exception that was at once broad and vague.[33] Since the federal statute was in derogation of the State's constitution, it was appropriate to resolve the ambiguity *against* coverage. Here, in contrast, Congress has used unambiguous terms to provide for broad coverage of "any program or activity," defined to include all state government operations; and Congress has also specified a number of categories as narrow exceptions to the rule of coverage, without excluding prisoners from coverage.[34] Thus, the situation is the reverse of that in

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485, Part II, *reprinted in* 1990 U.S.C.C.A.N. 366.

[32] The *Amos* majority disclaimed its adherence to this discredited approach to statutory construction but in fact that is the gist of its reasoning. 126 F.3d at 605 n.10; *id.* at 614 (Murnaghan, J., dissenting).

[33] *See* 501 U.S. at 467.

[34] Congress did specify a number of categories of individuals not covered by the ADA. It drafted explicit narrow statutory exceptions to ADA coverage but did not exclude prisoners. *See, e.g.*, 42 U.S.C.A. § 12211 (excluding transsexuals, compulsive gamblers, kleptomaniacs and pyromaniacs); 42 U.S.C.A. §§12114, 12210 (excluding from ADA coverage current illegal drug users); *see also* 29 U.S.C.A. § 706(8)(C)(i) (excluding from Rehabilitation Act coverage current illegal drug users). By specifically excluding certain groups from statutory coverage and not mentioning prisoners among them, Congress expressed its intention to cover prisoners under the statutes. It is a basic rule of statutory construction that where, as here, exceptions to a statute's sweeping language are narrowly drawn,

Gregory.

The *Amos* majority also erred in invoking the clear statement rule because, unlike the state judicial qualifications at issue in *Gregory*, state prison management is not a core function "going to the heart of representative government:"

> Maybe there is an inner core of sovereign functions, such as the balance of power between governor and state legislature, that if somehow imperiled by the ADA would be protected by the clear-statement rule, . . . but the mere provision of public services, such as schools and prisons, is not within that inner core.

Crawford, 115 F.3d at 485 (Posner, C.J.).[35] *See also Foster v. Love*, 66 U.S.L.W. 4015, 4016 (U.S. Dec. 2, 1997) (holding that invocations of state sovereignty are insufficient to override a state's obligation to follow applicable federal

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the exceptions are limited to those actually listed.

[35]The *Amos* majority's premise that the clear statement rule should be invoked based on the court's view of state prison management as a "core state function" is also erroneous. This Court has:

> reject[ed] as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional.' Any such rule leads to inconsistent results at the same time that it disserves principles of democratic self-governance, and it breeds inconsistency precisely because it is divorced from those principles.

Garcia v. Metro. Transit Auth., 469 U.S. 528, 546-47 (1985) (overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976)).

statutes setting a uniform federal election day, and invalidating a state statutory provision for congressional elections based on open primaries).

In *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725 (1995), this Court rejected the notion that the clear statement rule applies to anti-discrimination laws. The Court relied instead on another canon of statutory interpretation, mandating that civil rights legislation be read expansively. *Id.* at 732, 737 n.11. Congress has clearly expressed its intent to apply the non-discrimination mandate of the ADA and Rehabilitation Act to all operations of state and local governments, including state prisons. The court below was thus not free to disregard the statutory language and to create an exception for prisoners by invoking the clear statement rule.

C. The Court Below Erred in Failing to Defer to the DOJ's Rehabilitation Act Regulations Because Congress Explicitly Authorized The Regulations and Subsequently Incorporated Them into the ADA

Having found the statutes ambiguous, the court below erred by disregarding the DOJ regulations that resolve any possible doubt that Congress intended to apply the statutes to state prisoners. 126 F.3d at 606. These regulations command substantial deference because they were promulgated by the agency entrusted to enforce the Rehabilitation Act and authorized by Congress in 1980. 29 U.S.C.A. § 794(a); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Indeed, the regulations in this case are conclusive evidence of congressional intent, because Congress explicitly adopted these regulations in the ADA, making them part of the statute that state and local

governments must obey. 42 U.S.C.A. § 12201.

Congress was undoubtedly aware in 1990 when it enacted the ADA of the 1980 DOJ regulations which it had authorized under 29 U.S.C.A. § 794(a), expressly applying the Rehabilitation Act to state prisons. Had the decade-old DOJ interpretation been in conflict with congressional intent, Congress presumably would have specifically exempted state prisons from coverage.[36] Congress, however, did precisely the opposite. It incorporated these regulations into the ADA,[37] expressly applying the statute to state prisons and prisoners. Accordingly, the states are bound under the Supremacy Clause by the DOJ regulations, which are embodied in the ADA. *Chevron* deference does not even come into play. The *Amos* majority's refusal to apply the statute to state prisoners is a refusal to apply the statute as Congress wrote it.

Chevron deference is relevant, however, when construing the Rehabilitation Act which requires the Attorney General to promulgate regulations to implement and enforce the statute and then to submit the proposed regulations to a congressional committee for approval. *See* 29 U.S.C.A. § 794(a). Many of these regulations specifically apply the statute to state prisons.[38] Because the DOJ's interpretation of

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[36]*See supra* note 34.

[37]42 U.S.C.A. § 12201(a); H.R. Rep. No. 485, Part II, *reprinted in* 1990 U.S.C.C.A.N. 267, 366, 473.

[38]*See, e.g.*, 28 C.F.R. pt. 42(G), app. B, subpt. (c)(2) (1980); 28 C.F.R. § 42.540(h) (1980); 28 C.F.R. § 42.540(j) (1980); 45 Fed. Reg. 37,620, 37,630 (1980). Likewise, DOJ regulations first promulgated in 1991 under the ADA make it explicit that the statute applies to state prisons. Congress "designate[d] the [DOJ] as the agency responsible for coordinating the compliance activities of public entities that administer 'programs, services, and regulatory activities relating to law enforcement, public safety, and the

the statute is longstanding and reasonable, the court below was not at liberty to reject the agency's interpretation in favor of its own, under the principle stated in *Chevron*.

The very preamble to the DOJ regulations promulgated in 1980 under the Rehabilitation Act explicitly requires that "a sufficient number of detention cells need be accessible to wheelchair users" in detention and correctional facilities.[39] These regulations further require that:

> [f]acilities available to all inmates or detainees, such as classrooms, infirmary, laundry, dining areas, recreation areas, work areas, and chapels, must be readily accessible to any handicapped person who is confined to that facility. Beyond insuring the physical accessibility of facilities, detention and correctional agencies must insure that their programs and activities are accessible to handicapped persons. . . . In making housing

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administration of justice, *including courts and correctional institutions*.'" 42 U.S.C.A. § 12134 (emphasis added). Moreover, the regulations are accompanied by a detailed interpretive analysis which makes it explicit that they apply to state prisoners:

> A public entity is not . . . required to provide attendant care, or assistance in toileting, eating, or dressing to individuals with disabilities, except in special circumstances, such as where the individual is an inmate of a custodial or correctional institution.

28 C.F.R. pt. 35, app. A at 21-22 (1997). This Court accords the same deference to the DOJ interpretive analysis as to the regulations themselves. *See Alexander v. Choate*, 469 U.S. 287, 305 n.26 (1985).

[39] 28 C.F.R. pt. 42(G), app. B, subpt. (c)(2)(1980); 45 Fed. Reg. 37,620, 37,630 (1980).

> and program assignments, such [correctional] officials must be mindful of the vulnerability of some handicapped inmates to physical and other abuse by other inmates. The existence of a handicap alone should not, however, be the basis for segregation of such inmates in institutions or any part thereof where other arrangements can be made to satisfy safety, security and other needs of the handicapped inmates.

45 Fed. Reg. 37,630 (1980).

The DOJ implementing regulations explicitly define the word "program" to include the operations of a department of corrections, and explicitly define the word "benefit" to include disposition, sentencing and confinement.[40] Moreover, regulations promulgated under Section 502 of the Rehabilitation Act[41] adopt the Uniform Federal Accessibility Standards [UFAS] accessibility guidelines, which include provisions specifically covering state jails and prisons. The DOJ adopted and incorporated UFAS into the regulations on March 7, 1988.[42]

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[40]28 C.F.R. § 42.540(h) (1980).

[41] Section 502 of the Rehabilitation Act established an Architectural and Transportation Barriers Compliance Board. Congress mandated the Board to "ensure compliance with the standards prescribed pursuant to the . . . Architectural Barriers Act of 1968, [42 U.S.C.A. §§ 4151 - 57], and "to establish . . . minimum guidelines and requirements for the standards issued pursuant to the [Architectural Barriers Act]." 29 U.S.C.A. § 792(b) (West Supp. 1997).

[42]*See* 28 C.F.R. § 42.522(b) (1988). DOJ appended to the regulations promulgated under Title II of the ADA the UFAS requirements which specifically mention jails, prisons, and "other detention or correctional

When, as here, "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. The intent of Congress to apply the statutes to state prisons could not be clearer because Congress adopted the Rehabilitation Act regulations in the ADA. 42 U.S.C.A. §12201.

Even if Congress had not explicitly adopted in the ADA the regulations applying the statute to prison, the conclusion is unavoidable under the rule in *Chevron* that the statute applies to prisoners. In *Chevron,* this Court stated, courts must not disregard regulations unless they are "arbitrary, capricious, or manifestly contrary to the statute. . . . considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." 467 U.S. at 844 (citations omitted). *See also Smiley v. Citibank (S. D.), N.A.*, 116 S. Ct. 1730, 1733 (1996) ("It is our practice to defer to the reasonable judgments of agencies with regard to the meaning of ambiguous terms in

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facilities." The standards expressly apply to "institutional occupancies where the occupants are under some degree of restraint or restrictions for security reasons." *See* 41 C.F.R. pt. 101, subpt. 101-19.6, app. A, § 4.1.4(9)(c) (1997). Agencies may comply with either UFAS or ADA Accessibility Guidelines for Buildings and Facilities (ADAAG) in meeting their obligations under the ADA. 36 C.F.R. § 1191.2 (1997); 28 C.F.R. § 35.151(c) (1997). Both sets of standards refer explicitly to prisons, jails and detention facilities. Contrary to the *Amos* majority's contention that the regulations intrude upon state prison management, 126 F.3d at 606, the regulations do *not* require that every facility must be handicap-accessible; rather, they provide that the system *viewed in its entirety* must be accessible. *See* 45 Fed.Reg. 37,620, 37,630 (1980). In addition, DOJ regulations codified at 28 C.F.R. § 35.151(c) give agencies the choice of following UFAS or the ADA Accessibility Guidelines for Buildings and Facilities (ADAAG) in meeting their obligations under the ADA. Indeed, prison officials need not follow *either* set of guidelines, as long as they provide equivalent access. *Id.*

statutes that they are charged with administering.")

This Court has repeatedly applied the *Chevron* rule in interpreting the disability discrimination statutes, stressing that the regulations implementing the Rehabilitation Act, because they were promulgated with the oversight and approval of Congress, are an important source of guidance on the meaning of the Rehabilitation Act and merit substantial deference. *See Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 634-35 (1984); *Alexander v. Choate*, 469 U.S. 287, 304 n.24 (1985); *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 279 (1987). These longstanding regulations provide strong evidence that it was Congress' intention to apply the statutes to state prisoners.[43] They effectuate the broad remedial purpose of the statutes to eliminate discrimination; they are entirely consistent with the plain meaning of the statutory language (and indeed, they have been incorporated by Congress into the ADA); and they impose no obligations on state prisons beyond those mandated by the statutes' broad nondiscrimination mandate.

The Fourth Circuit rejected the DOJ's longstanding, reasonable statutory interpretation. Citing "enormous" (but unspecified) implications for the balance of power between the federal and state governments, the majority in *Amos* stated, "we will not defer to an administrative agency's interpretation

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[43]"These regulations were expressly authorized by Congress . . . and, in view of Congress' delegation, the DOJ's regulations should be accorded 'controlling weight unless [they are] arbitrary, capricious, or manifestly contrary to the statute.'" *Yeskey*, 118 F.3d at 171 (citing *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995)) (internal citations omitted).

of the statute, however reasonable." 126 F.3d at 607.[44] But there is no "prison exception" to the principle that courts must give effect to the unambiguously expressed intent of Congress. The *Amos* majority's refusal to give effect to the statutory provision expressly incorporating the regulations in the ADA is in effect an insupportable judicial repeal of the statute.

CONCLUSION

For the above reasons, petitioners request that the Court grant this petition for a writ of certiorari and review the Fourth Circuit's determination that the Rehabilitation Act and the ADA do not apply to state prisoners.

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[44]In the absence of any precedential support for their rejection of the *Chevron* doctrine, the *Amos* majority cited the dissenting opinion in *Gregory*. *Id.* at 607 (citing *Gregory*, 501 U.S. at 493 (Blackmun, J., dissenting), for the proposition that this Court "soundly rejected" *Chevron* deference in favor of the "clear statement rule").

Respectfully submitted,

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December 19, 1997

APPENDIX TO PETITION FOR CERTIORARI

Opinions Below

AMENDED ORDER (June 10, 1996) 1a

ORDER (May 30, 1996) 2a

MEMORANDUM (January 26, 1996) 4a

ORDER (January 26, 1996) 7a

MEMORANDUM (June 26, 1991) 8a

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Statutes

29 U.S.C.A. § 701 (West 1985 & Supp. 1997) 13a

29 U.S.C.A. § 706 (West 1985 & Supp. 1997) 14a

29 U.S.C.A. § 792 (West 1985 & Supp. 1997) 15a

29 U.S.C.A. § 794(a), (b) (West Supp. 1997) 16a

42 U.S.C.A. § 12101 (West 1995) 18a

42 U.S.C.A. § 12114 (West 1995). 19a

42 U.S.C.A. § 12131 (West 1995) 19a

42 U.S.C.A. § 12132 (West 1995) 20a

42 U.S.C.A. § 12133 (West 1995) 20a

42 U.S.C.A. § 12134 (West 1995) 21a

42 U.S.C.A. § 12201 (West 1995) 21a

42 U.S.C.A. § 12210 (West 1995) 21a

42 U.S.C.A. § 12211 (West 1995) 21a

Regulations

28 C.F.R. pt. 35 app. A (1997) 22a

28 C.F.R. § 35.130 (1997) 23a

28 C.F.R. § 35.151 (1997) 23a

28 C.F.R. § 35.190 (1997) 24a

28 C.F.R. § 39.150 (1997) 25a

36 C.F.R. § 1191.2 (1997) 27a

41 C.F.R. pt. 101, subpt. 101-19.6, app. A (1997) 33a

45 C.F.R. § 84.12 (1997) 35a

45 Fed. Reg. 37620 - 37636 (1980)
(codified at 28 C.F.R. §§ 42.501 - 42.540,
app. A) (1980)) 36a

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GRANVILLE AMOS, et al.

v. CIVIL NO. JFM-91-508

THE MARYLAND DEPARTMENT
OF PUBLIC SAFETY AND
CORRECTIONAL SERVICES

AMENDED ORDER

It is, this 10th day of June, 1996,

ORDERED:

1. That the order dated May 30, 1996, is hereby withdrawn;

2. That defendants' motion for summary judgment as to all claims asserted by plaintiffs is granted; and

3. That judgment be entered in favor of defendant against plaintiffs.

/s/
J. Frederick Motz
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GRANVILLE AMOS, et al.

v. CIVIL NO. JFM-91-508

THE MARYLAND DEPARTMENT
OF PUBLIC SAFETY AND
CORRECTIONAL SERVICES
et al.

WILLIAM LEWIS SMITH

v. CIVIL NO. JFM-95-524

RICHARD LANHAM, et al.

ORDER

It is, this 30th day of May, 1996,

ORDERED:

1. These actions are consolidated;

2. In accordance with the memorandum and order that I entered herein on January 26, 1996, the motion for summary judgment filed by defendants in Civil No. JFM-91-508 as to all claims asserted by plaintiffs under § 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act of 1990 is granted, and judgment is entered in favor of defendants against plaintiffs as to those claims; and

3. In accordance with the colloquy between the court and counsel at the hearing held in Civil No. JFM-95-524 on May 1, 1996, and upon the representation of counsel that during that colloquy counsel for plaintiffs was speaking on behalf of plaintiffs in Civil No. JFM-91-508 as well, all claims asserted by plaintiffs in both cases under the Eighth Amendment of the United States Constitution are voluntarily dismissed without prejudice.

/s/
J. Frederick Motz
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CHAMBERS OF
J. FREDERICK MOTZ
UNITED STATES DISTRICT JUDGE

101 W. LOMBARD STREET
BALTIMORE, MARYLAND 21201
(410) 962-2600

January 26, 1996

MEMO TO COUNSEL RE: Amos v. MD Department of Public Safety Civil No. JFM-91-508
Smith v. Lanham
Civil No. JFM-95-524

Dear Counsel:

I have reviewed the extensive memoranda that have been filed in connection with the various summary judgment motions that have been filed in these cases.

Defendants' motion will be granted as to all of the claims asserted by plaintiffs in Civil No. 91-508 under § 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act of 1990. In Torcasio v. Murray, 57 F.3d 1340 (4th Cir. 1995) a three-judge panel of the Fourth Circuit strongly stated its view that those Acts do not apply to state prisons. I recognize that what the Court said in this regard is dictum and that plaintiffs believe the dictum is wrong. I also recognize that before Torcasio was decided I had ruled, based upon the then existing precedents, that State prisons are covered by the Rehabilitation Act and the ADA.

There are certainly some circumstances under which I would decline to follow mere dictum from the Fourth Circuit if I were of the view that the dictum was incorrect. Here, however, I am persuaded that considerations of sound judicial management and prudent use of resources dictate that I follow the Torcasio dictum. Were I not to do so and if the Fourth Circuit ultimately were to adhere to what it said in Torcasio, endless hours would be spent and wasted in litigating the myriad of issues (including ones relating to attorneys' fees) under the two statutes. If, on the other hand, the Fourth Circuit concludes on appeal in this case that the Torcasio dictum was incorrect, the case will simply be remanded for further proceedings.[1]

As to plaintiffs' claims for monetary damages for alleged constitutional violations relating to the medical care that they received (or, more accurately, did not receive), I will hold a hearing on the pending motions at 10:00 a.m. on Friday, February 9, 1996, in Courtroom 5A. Based upon my review of the memoranda, my tentative view is that the State defendants are entitled to summary judgment to the extent that plaintiffs' claims relate to the insufficiency of the medical treatment that they received even if the State defendants were put on notice of plaintiffs' claims in that regard by ARPs. I have questions regarding plaintiffs' claim that the State defendants failed to follow up on medical treatment that had been ordered. I ask you to be prepared to focus upon those subjects during the hearing.

Despite the informal nature of this ruling, it shall constitute an Order of Court, and the Clerk is directed to docket it accordingly.

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[1]Presumably, the court will at least adhere to the Torcasio holding relating to the issue of qualified immunity, thereby removing any monetary damage claims under the two Acts.

Very truly yours,

/s/

J. Frederick Motz
United States District Judge

cc: Court File

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GRANVILLE AMOS, et al.

v. CIVIL NO. JFM-91-508

THE MARYLAND DEPARTMENT
OF PUBLIC SAFETY AND
CORRECTIONAL SERVICES

ORDER

For the reasons stated in this memorandum to counsel being entered herewith, it is, this 26th day of January, 1996,

ORDERED that defendants' motion for summary judgment is granted as to all claims asserted by plaintiffs under § 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act of 1990.

/s/
J. Frederick Motz
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GRANVILLE AMOS, et al.

v. Civil No. JFM-91-508

THE MARYLAND DEPARTMENT
OF PUBLIC SAFETY AND
CORRECTIONAL SERVICES,
et al.

MEMORANDUM

Plaintiffs are disabled inmates of the Roxbury Correctional Institution ("RCI"), located near Hagerstown, Maryland. They allege that they have been denied access to services, programs, facilities, and benefits provided to non-disabled RCI inmates. They seek relief under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and 42 U.S.C. § 1983.

Defendants have moved to dismiss on the grounds that the plaintiffs have not alleged discrimination in any "program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a).[1] Their motion will be denied.

Section 504 of the Rehabilitation Act of 1973 prohibits officials of any "program or activity receiving Federal financial

[1] They also make the ancillary contention that the § 1983 claim should be dismissed because it can serve only as a vehicle to enforce the § 504 claim. I need not reach this issue because I uphold the § 504 claim.

assistance" from discriminating against otherwise qualified individuals with handicaps. 29 U.S.C. § 794(a). The question presented here is whether the plaintiffs, by virtue of their incarceration at RCI, take part in any "program or activity receiving Federal financial assistance."

29 U.S.C. § 794(b)(1)(A) defines "program or activity" as "all of the operations of a department, agency, special purpose district, or other instrumentality of a State or of a local government." Legislative history of § 794(b) reveals that Congress intended to establish a broad definition of "program or activity." The Senate Report accompanying § 794(b) expressed Congress's intention to "restore . . . the broad, institution-wide application which characterized coverage and enforcement from the time of initial passage until the [Grove City College v. Bell, 465 U.S. 555 (1984)] decision." S. Rep. No. 64, 100th Cong., 2d Sess. 4, reprinted in 1988 U.S. Code Cong. & Admin. News 3, 5.

This case turns on RCI's status within the Maryland prison system. According to the defendants, RCI is a component of the Maryland Division of Corrections, which in turn is part of the Maryland Department of Public Safety and Correctional Services ("DPSCS"). The defendants do not deny that DPSCS receives federal funding.[2] From the plain language of § 794(b)(1)(A), RCI is therefore subject to § 504 of the Rehabilitation Act. DPSCS is a "department . . . of a State" which presumably receives federal financial assistance, and RCI is part of the "operations" of DPSCS. Accord Bonner v. Arizona Dep't of Corrections, 714 F. Supp. 420 (D. Ariz. 1989) (because

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[2] In addition, it is uncontroverted that the Division of Corrections receives federal funds, although the defendants characterize these funds as being "extremely limited." The warden of RCI has submitted an affidavit stating that RCI receives no federal financial assistance.

Department of Corrections received federal funding, § 504 of Rehabilitation Act applied to "all of the operations of the Department . . . regardless of which specific program receives federal funds").

Legislative history supports this conclusion. The Senate report quoted above provides the following analysis of § 794(b)(1)(A):

> The bill provides that when any part of a state or local government department or agency is extended federal financial assistance, the entire agency or department is covered . . . . Examples: If federal health assistance is extended to a part of a state health department, the entire health department would be covered in all of its operations. S. Rep. No. 64, 100th Cong., 2d Sess. 16, reprinted in 1988 U.S. Code Cong. & Admin. News 3, 18.

This example is directly analogous to the instant case. Here, federal funding has been provided to the DPSCS. Therefore, "the entire . . . department would be covered in all of its operations."

The defendants make two arguments to the contrary. First, they contend that RCI is not part of the "operations" of DPSCS. Pointing out that RCI has its own budget and that RCI's warden is vested with certain authority to run the institution, the defendants argue that RCI is autonomous within the Maryland prison system. See Md. Ann. Code art. 27, § 682(b). This argument is unpersuasive. Although the warden of RCI may well possess control over many aspects of RCI's operations, by the defendants' own admission RCI is part of the Division of Corrections, which is in turn part of the DPSCS. Therefore, to

argue that RCI is not part of the "operations" of DPSCS is to defy the administrative structure of the Maryland prison system as the defendants themselves have described it.

Second, the defendants cite legislative history for the proposition that Congress intended to establish "institution-wide" coverage for § 504 of the Rehabilitation Act. See, e.g., S. Rep. No. 64, 100th Cong., 2d Sess. 4, reprinted in 1988 U.S. Code Cong. & Admin. News 3, 6. They argue that since RCI is an "institution," and does not receive federal funds, it therefore is not covered by § 504. While possessing a superficial plausibility, this argument founders on the plain language of 29 U.S.C. § 792(b)(1)(A). It also ignores the context in which § 792(b) was enacted.

Congress adopted § 792(b) as the Civil Rights Restoration Act of 1987, Pub. Law No. 110-259, 102 Stat. 28 (1988). The stated objective of the Act was to overturn the Supreme Court decision of Grove City College v. Bell, 465 U.S. 555 (1984). See, e.g., S. Rep. No. 64, 100th Cong., 2d Sess. 2, reprinted in 1988 U.S. Code Cong. & Admin. News 3, 4. In Grove City a private college enrolled some students who received federal financial aid but otherwise declined to accept federal funds. The Supreme Court rejected the contention that these facts "trigger[ed] institutionwide coverage" under a non-discrimination statute similar to § 504. 465 U.S. at 573. Instead, the Court held that only the college's financial aid office was subject to the dictates of the non-discrimination statute. Id. at 574.

With this background, it is apparent that Congressional references to "institution-wide" coverage in the legislative history of the Civil Rights Restoration Act merely indicate specific rejection of Grove City. The "institution-wide" language has little relevance to a case, such as this one, brought against a

department of state government. See S. Rep. No. 64, 100th Cong., 2d Sess. 4, reprinted in 1988 U.S. Code Cong. & Admin. News 3, 6. (stating that the bill will "make clear that discrimination is prohibited throughout entire agencies or institutions if any part receives Federal financial assistance") (emphasis added).

For these reasons, defendants' motion to dismiss is denied. A separate order effecting the ruling made herein is being entered herewith.

Date: June 26, 1991

/s/
J. Frederick Motz
United States District Judge.

29 U.S.C.A. § 701 (West 1985 & Supp. 1997). Findings; purpose; policy

(a) Findings

Congress finds that —

(1) millions of Americans have one or more physical or mental disabilities and the number of Americans with such disabilities is increasing;

(2) individuals with disabilities constitute one of the most disadvantaged groups in society;

* * *

(5) individuals with disabilities continually encounter various forms of discrimination in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and public services; and

(6) the goals of the Nation properly include the goal of providing individuals with disabilities with the tools necessary to —

(A) make informed choices and decisions; and

(B) achieve equality of opportunity, full inclusion and integration in society, employment, independent living, and economic and social self-sufficiency, for such individuals.

29 U.S.C.A. § 706 (West 1985 & Supp. 1997). Definitions

For the purposes of this chapter:

* * *

(8)(C)(i) For purposes of subchapter V of this chapter, the term "individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs, when a covered entity acts on the basis of such use.

(ii) Nothing in clause (i) shall be construed to exclude as an individual with a disability an individual who —

(I) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(II) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(III) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in subclause (I) or (II) is no longer engaging in the illegal use of drugs.

(iii) Notwithstanding clause (i), for purposes of programs and activities providing health services and services provided under subchapters I, II and III of this chapter, an individual shall not be excluded from the benefits of such programs or activities on the basis of his or her current illegal use of drugs if he or she is otherwise entitled to such services.

29 U.S.C.A. § 792 (West 1985 & Supp. 1997). Architectural and Transportation Barriers Compliance Board

* * *

(b) Functions

It shall be the function of the Access Board to —

> (1) ensure compliance with the standards prescribed pursuant to the Act entitled "An Act to ensure that certain buildings financed with Federal funds are so designed and constructed as to be accessible to the physically handicapped", approved August 12, 1968 (commonly known as the Architectural Barriers Act of 1968; (42 U.S.C. 4151 et seq.) . . . including enforcing all standards under such Act, and ensuring that all waivers and modifications to the standards are based on findings of fact and are not inconsistent with the provisions of this section;
>
> * * *
>
> (3) establish and maintain minimum guidelines and requirements for the standards issued pursuant to the Act commonly known as the Architectural Barriers Act of 1968 [42 U.S.C.A. § 4151 et seq.] and titles II and III of the Americans with Disabilities Act of 1990 [42 U.S.C.A. § 12131 et seq. and § 12181 et seq.];
>
> (4) promote accessibility throughout all segments of society[.]
>
> * * *

29 U.S.C.A. § 794(a), (b) (West Supp. 1997).

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency. . . . The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) "Program or activity" defined

For the purposes of this section, the term "program or activity" means all of the operations of —

> (1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or
>
> (B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which assistance is extended, in the case of assistance to a State or local government;

* * *

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

42 U.S.C.A. § 12101 (West 1995) (1990)

(a) Findings

The Congress finds that —
(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;
(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals continue to be a serious and pervasive social problem;
(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;
(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

* * *

(b) Purpose

It is the purpose of this chapter —
(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and
(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C.A. § 12114 (West 1995). Illegal use of drugs and alcohol

(a) Qualified individual with a disability

For purposes of this subchapter, the term "qualified individual with a disability" shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

* * *

42 U.S.C.A. § 12131(1), (2)

As used in this subchapter:

(1) Public entity
The term "public entity" means —
(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government[.]

* * *

(2) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C.A. § 12132 (West 1995). Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C.A. § 12133 (West 1995). Enforcement

The remedies, procedures, and rights set forth in section 794a of Title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

42 U.S.C.A. § 12134 (West 1995). Regulations

(a) In general

Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this part.

* * *

42 U.S.C.A. § 12201 (West 1995). Construction

(a) In general

Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.

* * *

42 U.S.C.A. § 12210 (West 1995). Illegal Use of Drugs

(a) In general

For purposes of this chapter, the term "individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

* * *

42 U.S.C.A. § 12211 (West 1995). Definitions

(a) Homosexuality and bisexuality

For purposes of the definition of "disability" in section 12102(2) of this title, homosexuality and bisexuality are not impairments and as such are not disabilities under this chapter.

(b) Certain conditions

Under this chapter, the term "disability" shall not include — (1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(2) compulsive gambling, kleptomania, or pyromania; or

(3) psychoactive substance use disorders resulting from current illegal use of drugs.

28 C.F.R. pt. 35, app. A (1997)

Preamble to Regulation on Nondiscrimination on the Basis of Disability in State and Local Government Services (Published July 26, 1991)

* * *

Section 35.102 Application

This provision specifies that, except as provided in paragraph (b), the regulation applies to all services, programs, and activities provided or made available by public entities, as that term is defined in § 35.104. Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), which prohibits discrimination on the basis of handicap in federally assisted programs and activities, already covers those programs and activities of public entities that receive Federal financial assistance. Title II of the ADA extends this prohibition of discrimination to include all services, programs, and activities provided or made available by State and local governments or any of their instrumentalities or agencies, regardless of the receipt of Federal financial assistance. Except as provided in § 35.134, this part does not apply to private entities.

* * *

Paragraph (b)(8) also prohibits policies that unnecessarily impose requirements or burdens on individuals with disabilities that are not placed on others. For example, public entities may not require that a qualified individual with a disability be accompanied by an attendant. A public entity is not, however, required to provide attendant care, or assistance in toileting, eating, or dressing to individuals with disabilities, except in

special circumstances, such as where the individual is an inmate of a custodial or correctional institution.

28 C.F.R. § 35.130. General prohibitions against discrimination.

(a) No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

(b) (1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability —

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others[.]

* * *

(7) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

28 C.F.R. § 35.151 New construction and alterations.

(a) Design and construction. Each facility or part of a facility constructed by, on behalf of, or for the use of a public entity shall be designed and constructed in such manner that the

facility or part of the facility is readily accessible to and usable by individuals with disabilities, if the construction was commenced after January 26, 1992.

(b) Alteration. Each facility or part of a facility altered by, on behalf of, or for the use of a public entity in a manner that affects our could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities, if the alteration was commenced after January 26, 1992.

(c) Accessibility standards. Design, construction, or alteration of facilities in conformance with the Uniform Federal Accessibility Standards (UFAS) (appendix A to 41 CFR part 101-19.6) or with the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG) (appendix A to 28 CFR part 36) shall be deemed to comply with the requirements of this section with respect to those facilities, except that the elevator exemption contained at section 4.1.3(5) and section 4.1.6(1)(k) of ADAAG shall not apply. Departures from particular requirements of either standard by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility or part of the facility is therefore provided.

* * *

28 C.F.R. § 35.190 (1997) Subpart G Designated Agencies

(a) The Assistant Attorney General shall coordinate the compliance activities of Federal agencies with respect to State and local government components, and shall provide policy guidance and interpretations to designated agencies to ensure the consistent and effective implementation of the requirements of this part.

(b) The Federal agencies listed in paragraph (b)(1) through (8) of this section shall have responsibility for the implementation of subpart F of this part for components of State and local governments that exercise responsibilities, regulate, or administer services, programs, or activities in the following functional areas.

* * *

(6) *Department of Justice*: All programs, services, and regulatory activities relating to law enforcement, public safety, and the administration of justice, including courts and correctional institutions; commerce and industry, including general economic development, banking and finance, consumer protection, insurance, and small business; planning, development, and regulation (unless assigned to other designated agencies); state and local government support services (e.g., audit, personnel, comptroller, administrative services); all other government functions not assigned to other designated agencies.

28 C.F.R. § 39.150 (1997) Program accessibility: Existing facilities.

(a) *General.* The agency shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by handicapped persons. This paragraph does not —

(1) Necessarily require the agency to make each of its existing facilities accessible to and usable by handicapped persons;

(2) Require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and

administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 39.150(a) would result in such alterations or burdens. The decision that compliance would result in such alteration or burdens must be made by the Attorney General or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that handicapped persons received the benefits and services of the program or activity.

Architectural and Transp. Barriers Compliance Board
36 C.F.R. § 1191.2 (1997)

Accessibility Guidelines for Buildings and Facilities

Americans with Disabilities Act (ADA)

U.S. Architectural & Transportation Barriers Compliance Board
1331 F Street, N.W., Suite 1000
Washington, D.C. 20004-1111

* * *

Paragraphs marked with an asterisk have related, nonmandatory material in the Appendix. In the Appendix, the corresponding paragraph numbers are preceded by an A.

DETENTION AND CORRECTIONAL FACILITIES.

12.1* General. This section applies to jails, holding cells in police stations, prisons, juvenile detention centers, reformatories, and other institutional occupancies where occupants are under some degree of restraint or restriction for security reasons. Except as specified in this section, detention and correctional facilities shall comply with the applicable requirements of 4.1 through 4.35. All common use areas serving accessible cells or rooms and all public use areas are required to be designed and constructed to comply with section 4.

EXCEPTION: In detention and correctional facilities the requirements for areas of rescue assistance in 4.1.3(9), 4.3.10, and 4.3.11 do not apply. In addition, the requirements of 4.1.3(16) apply only to public use areas.

12.2 Entrances.

12.2.1 Public Entrances. Entrances used by the public, including those that are secured, shall be accessible as required by 4.1.3(8). Public entrances are those entrances used by the general public, including those used by both visitors and inmates or detainees.

EXCEPTION: Entrances, doors and doorways designed to be operated only by security personnel shall be exempt from 4.13.6, 4.13.9, 4.13.10, 4.13.11 and 4.13.12. Doors and doorways not operated solely by security personnel which are subject to security requirements that prohibit full compliance with these provisions shall comply to the maximum extent feasible.

12.2.2. Other Entrances. Where entrances used by inmates or detainees and not the general public are provided, at least one such entrance shall comply with 4.14. This requirement is in addition to the entrances that are required to be accessible by 4.1.3(8). Where provided, passenger loading zones serving entrances subject to this provision shall comply with 4.6.6.

EXCEPTION: Entrances, doors and doorways designed to be operated only by security personnel shall be exempt from 4.13.6, 4.13.9, 4.13.10, 4.13.11 and 4.13.12. Doors and doorways not operated solely by security personnel that are subject to security requirements that prohibit full compliance with these provisions shall comply to the maximum extent feasible. Entrances subject to 4.14 are not required to be connected by an accessible route to

public transportation stops, accessible parking, or public streets or sidewalks.

12.2.3. Security Systems. Where security systems are provided at public or other entrances required to be accessible by 12.2.1 or 12.2.2, an accessible route complying with 4.3 shall be provided through fixed security barriers. Where security barriers incorporate equipment such as metal detectors, fluoroscopes, or other similar devices which cannot be made accessible, an accessible route shall be provided adjacent to such security screening devices to facilitate an equivalent path of travel.

12.3* Visiting Areas. In non-contact visiting areas where inmates or detainees are separated from visitors, the following elements, where provided, shall be accessible and located on an accessible route complying with 4.3:

(1) Cubicles and Counters. Five percent, but not less than one, of fixed cubicles shall be accessible according to 4.32 on both the visitor and detainee or inmate sides. Where counters are provided, a portion at least 36 in (915 mm) in length shall comply with 4.32 on both the visitor and detainee or inmate sides.

EXCEPTION: At non-contact visiting areas not serving accessible cells or rooms, the requirements of 12.3(1) do not apply to cubicles or counters serving detainees or inmates.

(2) Partitions. Solid partitions or security glazing separating visitors from inmates or detainees shall comply with 7.2(3).

12.4 Holding and Housing Cells or Rooms: Minimum Number and Dispersion.

12.4.1* Holding Cells and General Housing Cells or Rooms.

(1) Minimum Number. At least three percent, but not less than one, of the total number of housing or holding cells or rooms provided in a facility shall comply with 12.5.

(2) Dispersion. Accessible cells or rooms complying with 12.5 shall be dispersed among all categories and types of general housing and holding areas. This does not require an increase in the minimum number specified by 12.4.1(1), nor does it require proportionate distribution of accessible cells among different categories or types of cells.

12.4.2 Special Holding and Housing Cells or Rooms. In addition to the requirements of 12.4.1, where special holding or housing cells or rooms are provided, at least one serving each purpose shall comply with 12.5. An accessible special holding or housing cell or room may serve more than one purpose. Cells or rooms subject to this requirement include, but are not limited to, those used for purposes of protective custody, disciplinary detention, detoxification, and medical isolation.

12.4.3* Accessible Cells or Rooms for Persons with Hearing Impairments. In addition to the requirements of 12.4.1, at least three percent, but not less than one, of general housing or holding cells or rooms equipped with audible emergency warning systems or permanently installed telephones within the cell or room shall comply with the applicable requirements of 12.6.

12.4.4* Medical Care Facilities. Medical care facilities providing physical or medical treatment or care shall comply with the applicable requirements of 6.1, 6.3 and 6.4, if persons may need assistance in emergencies and the period of stay may exceed 24 hours. Patient bedrooms or cells required to be

accessible under 6.1 and 6.3 shall be provided in addition to any medical isolation cells required to be accessible under 12.4.2.

12.4.5 Alterations to Cells or Rooms. When holding or general housing cells or rooms are being altered in an existing facility, or portion thereof, at least three percent of the number being altered shall be made accessible according to 12.4.1 until the number of accessible cells or rooms equals the total number of accessible cells or rooms required for the facility under 12.4.1.

12.5 Requirements for Accessible Cells or Rooms.

12.5.1 General. Cells or rooms required to be accessible by 12.4 shall comply with 12.5.

12.5.2 Minimum Requirements. Accessible cells or rooms shall be on an accessible route complying with 4.3. Where provided within housing or holding cells or rooms, the following elements or spaces shall be accessible and connected by an accessible route.

(1) Doors and Doorways. All doors and doorways on an accessible route shall comply with 4.13.

EXCEPTION: Doors and doorways designed to be operated only by security personnel shall be exempt from 4.13.6, 4.13.9, 4.13.10, 4.13.11 and 4.13.12. Other doors and doorways not operated solely by security personnel which are subject to security requirements that prohibit full compliance with these provisions shall comply to the maximum extent feasible.

(2)* Restrooms. At least one toilet facility shall comply with 4.22 and one bathing facility shall comply with 4.23. Privacy screens shall not intrude on the clear floor space required for fixtures and the accessible route.

(3)* Beds. Beds shall have maneuvering space at least 36 in (915 mm) wide along one side. Where more than one bed is provided in a room or cell, the maneuvering space provided at adjacent beds may overlap.

(4) Drinking Fountains and Water Coolers. Drinking fountains shall be accessible to individuals who use wheelchairs in accordance with 4.15 and shall be accessible to those who have difficulty bending or stooping. This can be accomplished by the use of a "hi-lo" fountain; by providing one fountain accessible to those who use wheelchairs and one fountain at a standard height convenient for those who have difficulty bending; by providing a fountain accessible under 4.15 and a water cooler; or by providing other such means as would achieve the required accessibility for each group.

(5) Fixed or Built-in Seating or Tables. Fixed or built-in seating, tables and counters shall comply with 4.32.

(6) Fixed Benches. Fixed benches shall be mounted at 17 in to 19 in (430 mm to 485 mm) above the finish floor. The structural strength of the bench attachments shall comply with 4.26.3.

(7) Storage. Fixed or built-in storage facilities such as cabinets, shelves, closets and drawers, shall contain storage space complying with 4.25.

(8) Controls. All controls intended for operation by inmates shall comply with 4.27.

(9) Accommodations for persons with hearing impairments required by 12.4.3 and complying with 12.6 shall be provided in accessible cells or rooms.

* * *

Federal Property Management Regulations pt. 101, subpt. 101-19.6, app. A (1997)

Appendix A to Subpart 101-19.6 — Uniform Federal Accessibility Standards

4.1.4 Occupancy Classifications

(4) Assembly. Assembly occupancy includes, among others, the use of a building or structure, or a portion thereof, for the gathering together of persons for purposes such as civic, social or religious functions, recreation, food or drink consumption, or awaiting transportation. A room or space used for assembly purposes by less than fifty (50) persons and accessory to another occupancy shall be included as part of that major occupancy. For purposes of these standards, assembly occupancies shall include the following:

Facilities

* * *

Courtrooms (public areas)

* * *

(5) **Business.** Business occupancy includes, among others, the use of a building or structure, or a portion thereof, for office, professional or service type transactions, including storage of records and accounts.

Facilities

* * *

Police stations

* * *

(9) **Institutional**. Institutional occupancy includes, among others, the use of a building or structure, or any portion thereof, in which people have physical or medical treatment or care, or in which the liberty of the occupants is restricted. Institutional occupancies shall include the following subgroups:

* * *

(c) Institutional occupancies where the occupants are under some degree of restraint or restriction for security reasons including:

Facilities	Application
Jails Prisons Reformatories Other detention or correctional facilities	5 percent of residential units available, or at least one unit, whichever is greater; all common use, visitor use, or areas which may result in employment of physically handicapped persons.

45 C.F.R. § 84.12 (1997)

§ 84.12 Reasonable accommodation.

(a) A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

(b) Reasonable accommodation may include: (1) Making facilities used by employees readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions.

(c) In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of a recipient's program; factors to be considered include:

(1) The overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget;

(2) The type of the recipient's operation, including the composition and structure of the recipient's workforce; and

(3) The nature and cost of the accommodation needed.

* * *

37622 Federal Register/Vol. 45. No. 108/Tuesday, June 3, 1980/Rules and Regulations

Subpart G — Nondiscrimination Based on Handicap in Federally Assisted Programs — Implementation of Section 504 of the Rehabilitation Act of 1973 and Executive Order 11914

* * *

General Provisions

§ 42.501 Purpose.

The purpose of this subpart is to implement section 504 of the Rehabilitation Act of 1973, as amended, which prohibits discrimination on the basis of handicap in any program receiving Federal financial assistance.

§ 42.502 Application.

This subpart applies to each recipient of Federal financial assistance from the Department of Justice and to each program receiving or benefiting from such assistance. The requirements of this subpart do not apply to the ultimate beneficiaries of Federal financial assistance in the program receiving Federal financial assistance.

§ 42.540 Definitions.

* * *

(h) The term "program" means the operations of the agency or organizational unit of government receiving or substantially benefiting from the Federal assistance awarded, *e.g.*, a police department or department of corrections.

* * *

(j) "Benefit" includes provision of services, financial aid or disposition (*i.e.*, treatment, handling, decision, sentencing, confinement, or other prescription of conduct).

* * *

Appendix B — Analysis of Final Rule

A. General Provisions

This subpart prohibits discrimination on the basis of handicap in any program, activity or facility receiving Federal financial assistance (§ 42.501). Section 504 protects not only the ultimate beneficiaries of Federal assistance statutes (*e.g.*, students, prisoners, general public) as identified in the Federal grant statutes directly or by inference, but also nonbeneficiary participants (*e.g.*, employees working in the program receiving Federal financial assistance regardless of whether a primary objective of the Federal assistance includes providing employment opportunities). The subpart applies to all Federal assistance programs administered by the Department and requires all recipients of such assistance to comply with the requirements of the subpart (§ 42.502). The subpart not only applies to grants, contracts and cooperative agreements entered into after the effective date of the subpart, but also applies to any Federal financial assistance previously extended which continues at the time the subpart becomes effective.

The subpart sets forth a variety of illustrative examples to identify conduct which is unlawfully discriminatory and requirements to maintain Federally assisted programs free of unlawful discrimination (§ 42.503).

* * *

C. Physical and other Accessibility to Programs

The subpart prohibits the exclusion of qualified handicapped persons from Federally assisted programs because a recipient's facilities are not readily accessible or usable. The recipient is not required to have each of its existing facilities or every part of a facility accessible to and usable by handicapped persons. The requirement is that the program, when viewed in its entirety, must be readily accessible to and usable by handicapped persons. Structural changes may be unnecessary where other less costly or burdensome methods may be equally effective.

* * *

The examples which follow also set forth a number of situations in which recipients are required under this subpart to provide auxiliary aids (§ 42.503(f) to remove communications barriers that prevent accessibility to Federally assisted programs. These examples are included as the result of a number of comments which recommended that the Department provide additional guidance in this area.

* * *

2. *Detention and Correctional Agencies and Facilities.* These agencies include jails, prisons, reformatories and training schools, work camps, reception and diagnostic centers, pre-release and work release facilities, and community-based facilities. Where local or State policy prohibits the detention or incarceration of wheelchair users, no structural modification to detention or correctional facilities to accommodate wheelchair users is required. Where there is no such exclusionary policy, structural modifications may be unnecessary where alternate

accessible facilities are available (*e.g.*, short term detention in the prisoner's home or at a medical facility). Where local policy precludes alternate detention facilities, a detention agency would be required to make structural modifications to accommodate detainees or prisoners in wheelchairs. In such circumstances, however, not every detention facility of the agency would have to become accessible. Only a sufficient number of detention cells need to accessible to wheelchair users as can be reasonably expected to be detained based on the agency's prior experience. A different problem arises, however, when accessibility requirements are imposed on small, independently operated community based facilities used, for example, for the placement of juveniles in a home setting. A metropolitan area may have a number of such homes. Each such home receiving assistance from the Department with fewer than fifteen employees is not required to be accessible to handicapped persons as long as a sufficient number of homes are accessible in the service area. If a home, after consultation with the handicapped person concerned, determines that its facilities are not accessible to such person because of the person's handicapping condition, it is the responsibility of the home to locate an accessible home providing equivalent services (§ 42.522(c)).

All detention and correctional agencies must provide accessibility for handicapped visitors (*e.g.*, accessible visiting rooms, restrooms) since the prisoner's right to receive visitors is an element of the program administered by the agencies. Where a facility's visitation area is inaccessible to the handicapped, a detention or correctional agency has the option to (a) house the prisoner in a facility which is accessible to handicapped visitors, (b) move the prisoner to an alternate, accessible area either within or outside the facility for visits from wheelchair users, (c) make structural modifications to make the visitation area accessible. It should be kept in mind that the benefit provided is

the right to visit rather than the right to visit in any particular area.

Facilities available to all inmates or detainees, such as classrooms, infirmary, laundry, dining areas, recreation areas, work areas, and chapels, must be readily accessible to any handicapped person who is confined to that facility. Beyond insuring the physical accessibility of facilities, detention and correctional agencies must insure that their programs and activities are accessible to handicapped persons. For example, correctional agencies should provide for the availability of qualified interpreters (certified, where possible, by a recognized certification agency) to enable hearing impaired inmates to participate on an equal basis with nonhandicapped inmates in the rehabilitation programs offered by the correctional agencies (*e.g.*, educational programs).

Correctional officials should take into account any handicaps which inmates may have in classifying them. In making housing and program assignments, such officials must be mindful of the vulnerability of some handicapped inmates to physical and other abuse by other inmates. The existence of a handicap alone should not, however, be the basis for segregation of such inmates in institutions or any part thereof where other arrangements can be made to satisfy safety, security and other needs of the handicapped inmate.